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IN THE

Supreme Court of the United States

TIMOTHY LEE HURST,

Petitioner,

—v.—

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF FLORIDA, AND THE CONSTITUTIONAL ACCOUNTABILITY CENTER, IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Florida is one of its statewide affiliates. *Amici* respectfully submit this brief to assist the Court in resolving whether Florida's capital sentencing procedures violate the Sixth and Eighth Amendments to the Constitution. The questions before the Court are of substantial importance to the ACLU and its members.

The Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars and the public to improve understanding of the Constitution and to preserve the rights, freedoms, and structural safeguards that our charter guarantees. CAC accordingly has a strong interest in this case and in the scope of the protections provided by the Sixth and Eighth Amendments.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court. No party has authored this brief in whole or in part, and no one has made a monetary contribution to the preparation or submission of this brief other than *amici*, its members, and its counsel.

STATEMENT OF THE CASE

Before any person convicted of first-degree murder may be sentenced to death by a Florida court, the trial judge – but not a unanimous jury – must find "sufficient aggravating factors" from a statutorily-enumerated list; and must find that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." *See* Fla. Stat. §§ 921.141 (3)(a),(b), 775.082 (3)(a). In a non-binding majority vote, the jury advises on these questions, as well as the ultimate question: "whether the defendant should be sentenced to life imprisonment or death." § 921.141 (2)(a),(b),(c). As petitioner has explained, however, it is the judge who finds the facts necessary for a death sentence, and then decides whether to impose that sentence.

Following this statutory procedure, the jury in petitioner's case recommended the death penalty by a 7-5 vote. The jury had been presented with two possible aggravating factors. But it is impossible to know whether a majority voted in favor of either since Florida law allows a death sentence where four jurors believe one aggravator applies and three others believe a second aggravator applies, and the jurors did not identify those they found. As Florida law requires, the trial judge then sentenced petitioner to death based on his own independent finding that aggravating factors existed in this case to justify the death penalty, and that death was an appropriate sentence because the aggravating factors outweighed the mitigating factors. On appeal, petitioner's death sentence was upheld based solely on the trial judge's factual findings and without regard to the jury's recommendation.

SUMMARY OF ARGUMENT

Petitioner persuasively demonstrates that the Florida capital-sentencing scheme suffers from multiple constitutional defects that render it invalid under *Ring v. Arizona*, 536 U.S. 584, 609 (2002). First, the jury is deprived of its constitutionally-required role of finding aggravators; second, there is no requirement that even a majority of jurors agree on a single aggravator, and indeed the jurors may not have done so in this case; and third, the jury can recommend death by a simple majority vote, which is what occurred here. This brief focuses only on the last issue and, more specifically, on the historical support for the claim that a jury's findings of aggravating circumstances must be unanimous and certainly may not be made by a bare majority.

In *Ring*, this Court held that Arizona's capital sentencing scheme violated the Sixth Amendment because it allowed a judge, "sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Id.* at 609 (citation omitted). Building on its earlier decision in *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000), the Court ruled that a capital defendant has a Sixth Amendment right to a jury finding on factual issues that are either an element of the crime or determine eligibility for execution.

While the question whether the jury must be unanimous in such findings was not before the Court in *Ring*, Justice Scalia's concurring opinion assumed that unanimity would be required, 536 U.S. at 610 (Scalia, J., concurring). The history of the Sixth Amendment fully supports Justice Scalia's understanding. The right to a unanimous jury in

criminal cases had been an established part of English common law for centuries before the Sixth Amendment was ratified. The fact that the Sixth Amendment does not explicitly impose a unanimity requirement only shows that the drafters deemed it redundant. By the late eighteenth century, the right to be tried by a jury of one's peers had long incorporated the principle that a criminal conviction must rest on a unanimous jury verdict. The constitutional framers, as well as founding-era legislators, judges, and commentators were united in their view that the Sixth Amendment jury right encompassed the age-old common law right to unanimity.

Four members of this Court reached a different conclusion in *Apodaca v. Oregon*, 406 U.S. 404 (1972), but that conclusion is not controlling here for several reasons: (a) Justice Powell's critical fifth vote in *Apodaca* rested on the very different proposition that the unanimity required for federal juries by the Sixth Amendment did not apply to the states, adopting a view on incorporation the Court has discredited in later decisions; (b) *Apodaca* did not involve a capital case; (c) it involved a 10-2 or 11-1 vote, not the 7-5 vote at issue here; and (d) as shown below, the conclusions of the four justices about the history of the Sixth Amendment and the Framer's understanding of the jury right were incorrect.

At a bare minimum, history makes clear that the power to impose the death penalty, and to find the predicate facts for execution, was the sole province of unanimous juries. This history further supports petitioner's argument, which *amici* endorse but do not repeat, that Florida's capital sentencing

scheme violates the Eighth Amendment. Pet. Br. at 35, 47-49 (discussing failure of Florida's scheme to fulfill a retributive purpose, achieve reliable death verdicts, and comport with the evolving standards of decency).

Because the jury in this case did not cast *any* binding vote on petitioner's death sentence, that sentence cannot stand even if the jury's vote had been unanimous. But the ultimate sentence of death requires more than a simple majority vote under any circumstances. This Court has never upheld a 7-5 verdict even for far less serious crimes – and, indeed, strongly suggested in *Apodaca* that such verdicts would be unconstitutional. *A fortiori*, more is required when the state seeks to impose the uniquely-harsh and irrevocable punishment of death.

ARGUMENT

I. THE RIGHT TO A UNANIMOUS JURY VERDICT IN CRIMINAL CASES WAS WELL-ESTABLISHED WHEN THE SIXTH AMENDMENT WAS ADOPTED AND WIDELY UNDERSTOOD TO BE PART OF ITS JURY TRIAL GUARANTEE.

Long before the Sixth Amendment was drafted and ratified, the English common-law had incorporated the requirement of jury unanimity in criminal cases. *See, e.g.*, 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) (hereafter Blackstone Commentaries). When American Justice James Wilson gave a founding-era lecture on the right to a jury trial, he told the following story in tracing the requirement of unanimity to the Middle Ages:

> "[The King] hanged [Judge] Cadwine, because he judged Hackwy to death without the assent of all the jurors in a case where he [Hackwy] had put himself upon a jury of twelve men; and because *three were for saving him against nine*, Cadwine removed the three for others upon whom Hackwy did not put himself."[2]

Those who came to this country from England regarded the right to a jury trial as part of "their birthright and inheritance." *Duncan v. Louisiana*, 391 U.S. 145, 154 n.21 (1968) (quoting *Thompson v. Utah*, 170 U.S. 343, 350 (1898) (quoting 2 Joseph Story, *Commentaries on the Constitution of the United States* 559 (Melville M. Bigelow ed., William S. Hein & Co., Inc., ed., 1994) (1891) (hereafter Story *Commentaries*))). Furthermore, they understood that inheritance to embrace what it had embraced in England. Not surprisingly, therefore, the importance of unanimity is a consistent theme in English common law, discussions of the jury right during the founding era, early interpretations of the right in state and federal courts, including this Court, and the understanding of commentators interpreting the

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[2] *See* Lectures of Justice James Wilson (1791) in 2 *Collected Works of James Wilson* 970 (K. Hall & M. Hall eds., 2007) (hereafter *Wilson*) (quoting Andrew Horne, *The Mirror of Justices* (William Joseph Whittaker, ed. 1895) (emphasis added)). The internal cite is to a currently available edition of this book, as Justice Wilson provided no year of publication in his citation.

jury right and/or the Sixth Amendment throughout the antebellum era.

A. Unanimity Was Part Of The English Common-Law Jury Right.

By the founding of our Nation, unanimity had been integral to the English jury right for centuries. *See, e.g.*, 4 Blackstone Commentaries 343; Thomas Andrew Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200-1800* 18 (1985); Jeffrey Abramson, *We, The Jury: The Jury System and the Ideal of Democracy* 72 (BasicBooks 1994); John Guinther, *The Jury in America* 12 (1988) (reviewing English foundation).

Blackstone is perhaps the most famous among many to describe the English jury right as including unanimity. He explained that "the founders of English law have with excellent forecast contrived" that no man should be convicted except upon an indictment "confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen, and superior to all suspicion." 4 Blackstone Commentaries 343. The protection of unanimous juries had life and death consequences in founding-era England, where "more than 200 offenses [were] then punishable by death[.]" *Woodson v. North Carolina*, 428 U.S. 280, 289 (1976) (plurality opinion).

As the Court recognized in *Apodaca*, "the requirement of unanimity arose in the Middle Ages[.]" 406 U.S. at 407. Historians record the first "instance of a unanimous verdict in 1367, when an English Court refused to accept an 11-1 guilty vote after the lone holdout stated he would rather die

in prison than consent to convict." Abramson, *supra*, at 179.

In 1670, the Crown tried William Penn in the Old Bailey on charges of speaking and preaching on a street and thereby causing "a great concourse and tumult of people in the street [who] a long time did remain and continue, in contempt of . the King, and of his law, to great disturbance of his peace."[3] After one and a half hours, the twelve jurors deadlocked. Abramson, *supra*, at 71. Eight voted for conviction, but four would agree to nothing more than that Penn had "preached to an assembly of persons[.]" Green, *supra*, at 224.

The bench "berated the four and sent the jury away to reconsider its decision." *Id.* at 224-25. The formerly divided jury next united around a "verdict" that Penn merely spoke on the street, which the court rejected. *Id.* at 225. The jury ultimately reached a unanimous verdict of not guilty. *Id.*[4] The course of history for this early colonial leader thus may well have turned on the English protection of a unanimous jury verdict.

Unanimity was part of the proud English jury tradition our founders brought to this land.

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[3] Green, supra, at 222-25; *see also* Abramson, *supra*, at 72; Guinther, *supra*, at 24-25.

[4] A perhaps better known part of the story is that the Crown fined the dissenting jurors, including Edward Bushel, for their verdict. Abramson, *supra*, at 72. The jurors refused to pay, were imprisoned, and later successfully petitioned for their release, creating the precedent that jurors may never be fined or imprisoned for their verdicts. *Id.*

B. The Founders Claimed For This Nation The English Common-Law Jury Right, Which Included Unanimity.

This English history retained importance here because the jury trial right our Founders claimed was one and the same with the English common-law right. The impetus of our Founders' concern was the Crown's increasing violations of the colonists' common-law jury right. *See Duncan*, 391 U.S. at 151-52 (recounting this history). The drafters of the Declaration of Independence listed this complaint amongst their grievances. *Id.*

Our Founders specifically "claim[ed] all the benefits secured to the subject by the English constitution, and particularly that inestimable one of trial by jury." Continental Congress Resolution 5, in 1 *J. of Continental Congress*, 1774-1789, 69 (1904). The right the founders claimed was not some lesser, watered-down version of the common-law right. In particular, the Founders made clear in their writings that integral to the "great right [of] trial by jury" was unanimity. In a letter to inhabitants of Quebec, listing the "rights . we are, with one mind, resolved never to resign but with our lives," the Continental Congress described the jury right as follows: "This provides that neither life, liberty, nor property, may be taken from its possessor, until twelve of his unexceptionable countryman and peers shall pass their sentence upon oath against him . "[5]

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[5] *See* Continental Congress, Letter to the Inhabitants of Quebec, in 1 *Journals of Continental Congress*, 1774-1789, 105, 106, 107 (Worthington Chauncey Ford ed., 1904).

Even the British soldiers accused of the Boston Massacre received the benefit of a unanimous jury – they were acquitted.[6] Early published grand jury addresses provide further evidence that those indicted on criminal charges were guaranteed the right to a unanimous jury. *See generally Gentlemen of the Grand Jury: The Surviving Grand Jury Charges from Colonial, State, and Lower Federal Courts before 1801*, vol. 1-2 109 (Stanton D. Krauss ed. 2012). *Id.* at 317 (MA, 1765, charge of Thomas Hutchinson), 665 (NY, 1768, Robert Livingston), 1108 (SC, 1703, Nicholas Trott), 1181 (SC, 1774, William Henry Drayton), 1204 (same in 1776).

C. Madison's Original Draft Of The Sixth Amendment Required Jury Unanimity, And Its Subsequent Omission From The Text Did Not Reflect Any Substantive Disagreement With The Requirement.

In the original draft of the Sixth Amendment James Madison submitted to Congress, he proposed a right to an "impartial jury of freeholders of the vincinage, with the *requisite of unanimity of conviction*, of the right of challenge, and other accustomed requisites." Cong. Reg. June 8, 1789, vol.

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[6] *The Trial of William Wemms, James Hartegan, William M'Cauley, Hugh White, Matthew, Killroy, William Warren, John Carrol, and High Montgomery, Soldiers in his Majesty's 29th Regiment of Foot, for the Murder of Crispus Attucks, Samuel Gray, Samuel Maverick, James Caldwell, and Patrick Carr, on Monday-Evening* 207 (Boston: J. Fleeming 1770) (contemporaneous record of the trial of the soldiers accused in the Boston Massacre).

1, pp. 427-29 (emphasis added), in Neil Cogan, *The Complete Bill of Rights* 385 (1997).

The Senate substantially altered Madison's proposal, and sent it to a conference committee, which in turn drafted the familiar text that became the Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law

U.S. Const. amend VI (emphasis added). *See Apodaca*, 406 at 407-10 (recounting this history and similar discussion of it in *Williams v. Florida*, 399 U.S. 78, 95 (1970)).

At the time Congress was debating the proposed Bill of Rights, Madison wrote contemporaneous letters about the Senate's rejection of the language he proposed concerning the jury right. *Apodaca*, 406 U.S. at 409 (citing one of Madison's letters). Two letters to Edmund Pendleton, a Virginia representative to the Continental Congress, are particularly noteworthy.

On September 14, 1789, Madison wrote Pendleton that the Senate had "sent back the plan of amendments with some alterations which strike in my opinion at the most salutary articles." Neil Cogan, *supra*, at 480 (1997). The alterations he went on to discuss related to the vicinage (vicinity) requirement in his original text, opposed because states drew their pools from disparate geographical

subdivisions. *Id.* Madison did not mention any opposition to the unanimity requirement in his original proposal.

His second letter to Pendleton on September 23, 1789, two days before Congress approved the Bill of Rights, also focused on the Senate's "inflexib[ility] in opposing a definition of the locality of Juries." *Id.* at 480-81. Again, Madison made no mention of any known Congressional objection to the unanimity requirement. *Id. See also Apodaca,* 406 U.S. at 409 (noting the "considerable opposition in the Senate, particularly with regard to the vicinage requirement").

The reason Madison's letters to Pendleton *did not* complain about the elimination of his unanimity language from his proposal was that he and others believed that unanimity was an inherent part of the jury right set forth in the final text of the Sixth Amendment. This included Justice Wilson, a Founder who held strong views on the importance of unanimity and would have noticed had it been stripped from the Constitution. *See* § I (D), *infra.*

The ratification debate surrounding the original Constitution reflects a similar understanding. When North Carolina, Pennsylvania, Rhode Island, and Virginia separately suggested (among other alterations) that Art. III, § 2 be amended to make clear that the criminally accused has a right to a jury "without whose unanimous consent he cannot be found guilty," Cogan, *supra,* at 401-02, The Foreign Spectator, whose commentaries on the Constitution and amendment processes were widely read, described the amendments as unnecessary because all "these particulars are

included in the *usual trial by jury*."[7] (emphasis added).

A year before Madison submitted his proposed language, Chief Justice M'Kean of the Pennsylvania Supreme Court made a similar comment in an opinion about the provision in Pennsylvania's original Declaration of Rights expressly requiring unanimity.[8] *Respublica v. Oswald*, 1 Dall. 319, 323 (Pa. 1788). He wrote, "I have always understood it to be the law, independent of this section, that the twelve jurors must be unanimous in their verdict, and yet this section makes this express provision." *Id.*

By contrast, the concept of a bare majority verdict for criminal conviction would have been regarded by those who ratified the Constitution as inconsistent with both tradition and practice.

D. The Contemporaneous Teachings Of Justice Wilson Reinforce The View That Unanimity Was Part Of The Jury Right.

Lecturing on the Constitution as the Bill of Rights was still being ratified, Justice Wilson spoke long on the role of juries.[9] Wilson, *supra*, at 954-

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[7] Foreign Spectator, *Remarks on the Amendments to the Federal Constitution, Proposed by the Conventions . by a Foreign Spectator*, THE FED. GAZ. & PHILADELPHIA EVENING POST, Dec. 2, 1788, at 2 (emphasis added).

[8] *See* Pa. Const. of 1776, Art. IX.

[9] Before President Washington appointed him to this Court, Justice Wilson helped to shape both the Declaration of Independence and the original Constitution. He was one of few to sign both documents. *See* 1 Wilson, *supra*, xi. He is widely

1011. He repeatedly stated that unanimity was of "indispensable" significance in criminal cases. *Id.* at 962-78, 984-989, 991-92, 1010-11. Surely Justice Wilson would have noticed and commented had he understood that Congress intended the (still recent) omission of unanimity from the Sixth Amendment's final text as a substantive change.[10] But he did not. Quite the opposite, he extolled unanimity's ongoing significance.

Justice Wilson described unanimity as an answer to society's dilemma of how to determine whether one of its members has committed a crime. He recognized that society as a *whole* cannot make that determination. *Id.* at 960. If society as a whole *were* available to make the determination, he posited, then the accused's "fate must, from the very nature of society, be decided by the voice of the majority[.]" *Id.* But, since only *representatives* of society are available it is "reasonable" to demand that "the unanimous voice of those who represent parties

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recognized as an architect of our republic. *Id.* His Philadelphia lectures on the Constitution were attended by the Nation's founders, including the President. *Id.* at 403.

[10] Justice Wilson also rewrote the Pennsylvania Constitution in 1790, excising the previous explicit unanimity requirement and stating simply, "That trial by jury shall be as heretofore, and the right thereof remain inviolate." Pa. Const. art. IX, § VI. *See* Leonard W. Levy, *Seasoned Judgments: The American Constitution, Rights, and History* 52 (1995). It is inconceivable that Justice Wilson, while lecturing on the importance of unanimity, intended to strip the protection from the Pennsylvania Constitution. The only reasonable interpretation is that he believed its mention would have been redundant.

should be necessary to warrant a sentence of condemnation." *Id.*[11]

Justice Wilson further expounded on this theme, and the need to carefully delegate society's discretionary powers, with these eloquent words:

> When they are exercised by the people themselves, a majority, by the very constitution of society, is sufficient for the purpose. When they are exercised by a *delegation* from the people, in the case of an individual, it would be difficult to suggest, for his security, any provision more efficacious than one, that nothing shall be suffered to operate against him without the *unanimous* consent of the delegated body.

Id. at 961 (emphasis added). Referring back to these principles, Wilson then declared, "*It cannot have escaped you, that I have been describing the principles of our well known trial by jury.*" *Id.* at 962 (emphasis added). For Justice Wilson, unanimity was not separate from the right to jury, but part of its foundation.

Justice Wilson repeatedly made clear that the jury protection would be anemic if it did not require unanimity:

- "Can the voice of the state be indicated more strongly, than by the unanimous

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[11] He found the history in support of unanimity in civil cases much more clouded, and believed unanimity was not required. He reasoned that a majority vote would suffice for resolution of conflict between two private parties. *Id.* at 987.

voice of this selected jury?" *Wilson, supra*, at 985.

- "How stands the other party to a criminal prosecution? He stands single and unconnected. He is accused of a crime. The greatest security is provided by declaring, and by reducing to practice the declaration, that he shall not suffer, unless the selected body who act for his country say unanimously and without hesitation—he deserves to suffer." *Id.* at 986.

Interposing itself between the accused and the zealous prosecutor, the jury speaks with authority precisely because it speaks with a single, unified, unanimous voice.

In his lecture, Justice Wilson showed particular concern for unanimity in capital cases. In such "transaction[s], of all human transactions the most important," he taught, jurors must "form[] the[ir] *collected verdict of the whole from the separate judgment of each*." *Id.* (emphasis added). Nowhere is this more important than when a person is "'judged to death.'" *Id.*

Justice Wilson covered other topics in his lecture on the jury right. But he showed his particular admiration for the "criminal" and "capital" jury by describing the right in his closing words as "sublime" and comparing it to an "edifice" with "strong and lofty" walls, and within which "freedom enjoys protection, and innocence rests secure." *Id.* at 1011. As his lecture showed, unanimity, for this Founder, served as the structure's cornerstone.

E. Early Practices, Rulings, And Scholars Confirmed The Universal Understanding That Unanimity Was Inherent In The Jury Right.

The Founders held a common understanding of the English jury right, the same right British soldiers and William Penn each enjoyed in high-profile trials an ocean and a century apart. As seen further in the early case law, founding-era grand jury instructions, and statements of the early scholars reviewed below, this understanding was universally shared throughout the early states. That this jury right unquestionably encompassed unanimity could not have been lost on those who ratified the Sixth Amendment.

1. Early court decisions (from the founding era to the middle of the nineteenth century) confirm the role of unanimity as an integral part of the jury right inherited from the English.

Neither New Hampshire nor Ohio nor Georgia's state constitutions explicitly mentioned unanimity as part of the jury right,[12] but their high courts found it integral.

In New Hampshire, the legislature asked the high court whether it could permit non-unanimous jury verdicts or juries of less than twelve. *Opinion of Justices*, 41 N.H. 550, 550 (1860). The court's unanimous answer was no, on both counts. The court

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[12] Ga. Const. of 1798, § 6 ("Freedom of the press, and trial by jury, as heretofore used in this State, shall remain inviolate"); NH Const. of 1783 (barring deprivation of "life, liberty, or estate, but by the judgment of his peers or the law of the land"); Oh. Const. of 1851, art. 1, § 1.05.

noted that no right was "more strenuously insisted upon" by the Founders than the jury trial right, which had a well-settled single meaning, described in "[a]ll the books of the law," and "always to be understood and explained in that sense in which it was used at the time when the constitution and the laws were adopted." *Id.* at 551. Because "no such thing as a jury of less than twelve men, or a jury deciding by less than twelve voices had ever been known, or ever been the subject of discussion in any country of the common law" the court held that the legislature had no power to enact legislation along these lines. *Id.* at 551-52.

The Ohio Supreme Court reached the identical conclusion about a state statute, with virtually the identical reasoning. The court observed that the jury-trial right is "sufficiently understood, and referred to as a matter already familiar[,] definite as any other in the whole range of legal learning." *Work v. State*, 2 Ohio St. 296, 302 (1853). Extolling this "bulwark of the liberties of Englishmen," the court found it "beyond controversy" that its "number must be twelve, they must be impartially selected, and must unanimously concur " *Id.* at 304. The court therefore concluded that the legislature could not authorize non-unanimous criminal juries. *Id.* at 304.

The Georgia Supreme Court likewise concluded that the "sum and substance of this trial by jury" is that every accusation must be "confirmed by the unanimous suffrage of twelve of the prisoner's equals and neighbors " *Rouse v. State*, 4 Ga. 136, 147 (1848). After quoting at length the Blackstone common-law jury definition (which includes unanimity), the court found it "obvious that the

framers of [Georgia's 1798] Constitution, instead of incorporating the whole of this passage in that instrument, simply declare that the trial by jury, as therein delineated, shall remain inviolate." *Id.* *See also Inhabitants of Mendon v. Worcester Cnty.*, 27 Mass. 235, 246-47 (1830) (calling unanimity "one of the known incidents of a jury trial"); *State v. Christmas*, 20 N.C. 545, 411-12 (1839) (noting that unanimity required in state constitution based on common-law jury right).

Other early decisions noted the requirement of unanimity more or less in passing, taking for granted its application, including in states whose constitutions did not explicitly reference it.[13] *See State v. Porter*, 4 Del. 556, 557 (1 Harr. 1844); *Root v. Sherwood*, 6 Johns. 68, 69 (N.Y. Sup. Ct. 1810); *State v. Hall*, 9 N.J.L. 256, 262-63 (N.J. Sup. Ct. 1827); *State v. Baldwin*, 5 S.C.L. 309, 306-07 (S.C. Const. App. 1813); *Commonwealth v. Cawood*, 4 Va. 527, 533 (Va. Gen. Ct. 1826) (referring to unanimity as "Law of the land" and citing Blackstone rather than Virginia Constitution). Federal courts, interpreting the non-explicit federal constitutional jury right, did the same. *See United States v. Lawrence*, 26 F. Cas. 886, 887 (C.C.D.D.C. 1835).

And nowhere did the early courts express greater concern for unanimity than in capital cases. *See United States v. Perez*, 22 U.S. 579, 580 (1824) (Story, J.) (stating regarding hung juries that "in

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[13] Only the constitutions of North Carolina (1776), Pennsylvania (1776), Virginia (1776), and Vermont (1786) were explicit. *See* Cogan, *supra*, at 410-13 (collecting state provisions). As noted above, Pennsylvania later excised the explicit requirement. *See* Note 10, *supra*.

capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner"); *Atkins v. State*, 16 Ark. 568, 578 (1855) (encouraging caution before discharge of hung juries and quoting Justice Story in *Perez*); *Monroe v. State*, 5 Ga. 85, 148 (1848) (reversing capital murder conviction due to sequestration arrangements that undermined unanimity and stating: "God forbid that the prisoner should be sent to pray of the mercy of the Executive, a reprieve for an offence of which he has not been legally convicted."); *Nomaque v. People*, 1 Ill. 145, 148-50 (1825) (similar concern about practice promoting non-unanimous verdict in capital case); *Ned v. State*, 7 Port. 187, 216 (Ala. 1838); *Commonwealth v. Roby*, 29 Mass. 496, 519-20 (1832); *State v. Garrigues*, 2 N.C. 241, 241-42 (Super. L. & Eq. 1795); *Commonwealth v. Cook*, 6 Serg. & Rawle 577, 585 (Pa. 1822); *State v. McLemore*, 20 S.C.L. 680, 683 (S.C. L. & Eq. 1835). *See also Andres v. United States*, 333 U.S. 740, 752 (1948) (noting that an "instruction that a juror should not join a verdict of guilty, without qualification" of the statutory mercy recommendation "if he is convinced that capital punishment should not be inflicted" would be proper under federal capital statute).

2. In early grand jury addresses, judges instructed on the narrow charges sought by the government, but also expounded upon the fair legal system under which the accused (if indicted) would be tried. The charges were always published in the newspapers and widely read. *See generally Krauss, supra* (collecting grand jury addresses). And they frequently included paeans to the jury right inherited from England. From shortly after Independence to

after ratification of the Bill of Rights, they continued to refer to unanimity as part and parcel of that right.

For example, in 1779, a Georgia judge instructed:

> The trial by juries, [is] one of the most valuable rights we enjoy That no person can be subjected to the punishment consequent to the infringement of the laws, but on the verdict of twelve men, his equals in rank and condition of life, is of itself a must valuable privilege, and one of the best safeguards for [] life, liberty and fortune

Id. at 35. In 1784, a Kentucky judge channeled Blackstone and emphasized the jury right, its role as bulwark, protector of the people's liberties, and a "sacred" and "inviolate" "palladium." *Id.* at 281. He explained that the accused could not be convicted but upon a unanimous verdict *Id. See also id.* at 285 (similar).

In 1790, U.S. District Judge David Sewell instructed a grand jury regarding a felony alleged on the high seas. *Id.* at 1392. He stated that before the Revolution, a bare majority in a court of admiralty could convict. Now, however, "no man's life is brought into hazzard until twelve good and lawful men shall unanimously determine the charge to be true." *Id.* In 1792, despite that the recently-passed Sixth Amendment did not mention unanimity, U.S. District Judge Harry Innes instructed on the time-honored jury right and stated

that the jury's "unanimous voice is necessary to find [the accused] guilty." *Id.* at 1433.

Indeed, instructions that unanimity was part of the jury right were commonplace. *See id.* 39 (GA, 1779, Chief-Justice Anthony Stokes and Justice Martin Jollie), 109 (GA, 1792, John Houstoun), 207 (GA, 1798, Thomas Carnes), 297 (MD, 1781, Robert Hanson), 531 (MA, Robert Treat Paine, undated), 570 (NH, 1790, John Pickering), 731 (NW Territory, now OH, 1795, William Goforth) 773 (PA, 1785, Henry Slagle), 783 (PA, 1791, Enoch Edwards), 814 (PA, 1792, Alexander Addison), 1069 (PA, 1800, Edward Shippen), 1098 (PA, 1788, McKean), 1259 (SC, 1791, Elihu Hall Bay). Justices of this Court riding circuit gave similar addresses. *See, e.g.*, 3 *The Documentary History of the Supreme Court of the United States, 1789-1800*, 31 (Blair, J., 1795), 410 (Chase, J., 1800), 460-62 (Paterson, undated) (Maeva Marcus ed., 1992); 2 *Id.* at 485 (Blair, J., 1794).

3. The early scholars interpreting the Sixth Amendment jury right agreed. In 1803, just after passage of the Bill of Rights, St. George Tucker wrote that the Sixth Amendment secured the trial by jury described by Blackstone, and stated that no person could be "condemned of any crime" without a jury's "unanimous verdict, or consent." 1 St. George Tucker, *Blackstone's Commentaries App.* 34 (Birch & Small eds. 1803); *id.* at Vol. 5, at 348-49 n.2 (citing 4 Blackstone Commentaries 349-50).

Two decades later, in his influential treatise on American Law, Nathan Dane took the same view. 6 Nathan Dane, *General Abridgement and Digest of American Law* 226 (Boston: Cummings, Hilliard & Co. eds. 1823) (stating Bill of Rights provides that

"the jury in criminal matters must be unanimous"). So too did Justice Story, who understood that the phrase "trial by jury" meant "twelve men, impartially selected, who must unanimously concur in the guilt of the accused before a legal conviction can be had." 2 Story Commentaries 559. He went further to add that "any law dispensing with any of these requisites may be considered unconstitutional." *Id.*

After ratification of the Fourteenth Amendment, Joel Prentiss Bishop published his treatise, which too agreed that a jury trial is one where guilt is determined "by the unanimous finding of twelve impartial men, termed jurors," and that a "statute providing otherwise is void." 1 Joel Prentiss Bishop, *Criminal Procedure; or, Commentaries on the Law of Pleading and Evidence and The Practice in Criminal Cases* 531-32 (1880). *See also* John Norton Pomeroy, *An Introduction to Municipal Law* 78 (1864) (observing that the principle of unanimity "once adopted has continued as an essential part of the jury trial."); Thomas Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 319-320 (1868) (explaining that "common law incidents to a jury trial" that were "preserved by the constitution" included unanimity requirement).

The courts, judges and scholars of the era, then, shared in the understanding that the right to a jury meant the right to a unanimous jury. This was so since the founding and through the ratification of the Fourteenth Amendment.[14] As those who ratified

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[14] As the plurality in *Apodaca* noted, while the Carolinas, Connecticut, and Pennsylvania had previously allowed non-unanimous verdicts in the early seventeenth century, they no

the Constitution would have understood, nothing in these authorities permitted bare majority jury decisions in serious criminal matters, much less determinations of facts necessary for a death sentence.

F. This Court's Precedents Confirm Unanimity's Integral Role.

The above history jibes with the "unbroken line of cases" beginning in the late 1800's in which "the Justices of this Court have recognized, virtually without dissent, that unanimity is one of the indispensable features of the federal jury trial." *Johnson v. Louisiana*, 406 U.S. 366, 369 (1972) (Powell, J., concurring). *See also Apodaca*, 406 U.S. at 415-16 (Stewart, J., dissenting) (collecting cases). Albeit in federal trials, these decisions interpret the same Sixth Amendment jury right at issue here.

Chronologically first among these cases is *Thompson v. Utah*, 170 U.S. 343, 355 (1898), *overruled on other grounds by Collins v. Youngblood*, 497 U.S. 37, 38 (1990), which interpreted the jury right set forth in the Sixth Amendment and in Article III, § 2. Despite the lack of explicit reference to unanimity in either provision, this Court had no trouble finding that it is required. The Court held that the "United States gave the accused, at the time of the commission of his offense, the right to be tried by a jury of twelve persons, and made it impossible to deprive him of his liberty except by the unanimous verdict of such a jury." *Id.* at 355. *See also Am. Pub. Co. v. Fisher*, 166 U.S. 464, 468 (1897) (noting in civil

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longer did by the time of the framing of the Constitution. 406 U.S. at 408 n.3.

case that "unanimity" was essential to the common-law jury right); *Swain v. Alabama*, 380 U.S. 202, 211 (1965) (noting that "an impartial jury of 12 men who must unanimously agree on a verdict" is the common law system, and that "followed in the federal courts by virtue of the Sixth Amendment"), *overruled on other grounds by Batson v. Kentucky*, 476 U.S. 79 (1986); *Allen v. United States*, 164 U.S. 492, 501 (1896) (noting "[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves"); *Duncan*, 391 U.S. at 151-52 (referring to Blackstone's description when incorporating the Sixth Amendment).

G. *Apodaca v. Oregon* Does Not Determine The Result In This Case.

Four justices of the *Apodaca* plurality reached a conclusion at least partly in conflict with the history above, finding that Congress omitted the unanimity requirement from the Sixth Amendment's final text for "substantive effect," and that unanimity was not integral to the jury's role as a safeguard against the overzealous prosecutor or biased judge. 406 U.S. at 409-10. But the plurality then focused its analysis on the Oregon statute under challenge, which allowed conviction upon 10-2 or 11-1 verdicts. *Id.* at 411. Ultimately, the plurality "perceive[d] no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one." *Id.*

For several reasons, the *Apodaca* plurality's conclusions pose no obstacle to the Court now finding a historical basis for interpreting the Sixth Amendment to require that more than a bare

majority of a capital jury find the facts necessary for a death sentence.[15]

First, only four justices believed that the Sixth Amendment jury right did not encompass unanimity. *Id.* at 410. But five found that the right contemplated unanimous juries. *Id.* at 414 (Stewart, J., dissenting); *Johnson*, 406 U.S. at 381 (Douglas, J., dissenting). Justice Powell was among these five with regard to federal criminal trials, *id.* at 371 (Powell, J. concurring), but he held to the solitary view that "there is no sound basis for interpreting the Fourteenth Amendment to require blind adherence by the States to all details of the federal Sixth Amendment standards." *Id.* at 375. The Court has since called Justice Powell's analysis into question. *See McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 766 n.14 (2010) (identifying *Apodaca* as the sole exception in a long line of cases holding that incorporated Bill of Rights protections are to be enforced under the Fourteenth Amendment equally against the states and the federal government and noting the decision was "the result of an unusual division among the Justices, not an endorsement of the two-track approach to incorporation").

Second, as the plurality acknowledged, it was not deciding a capital case, 406 U.S. at 406 n.1 (quoting Oregon Constitution limiting non-unanimous juries to non-capital cases), much less one

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[15] For additional reasons persuasively outlined in petitioner's brief, *Apodaca* poses no barrier to relief for Hurst. Most significantly, Florida's sentencing scheme relegates the jury to an advisory role, and thus does not entrust to the jury the fact finding *Ring* requires. A decision on that basis would steer far clear of any possible conflict with *Apodaca*.

involving fact finding that would make a person eligible for execution. That makes a "significant constitutional difference," *Beck v. Alabama*, 447 U.S. 625, 637 (1980), because the Court has cautioned against "procedural rules that tended to diminish the reliability of the sentencing determination." *Id.* at 638. As petitioner has shown, Pet. Br. at 47-51, Florida's procedures in fact do diminish the reliability of its capital sentencing determinations.

Third, not even the plurality entirely denigrated the important role of unanimity in the jury right. Again, it merely saw "no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one." *Apodaca*, 406 U.S. at 411. Florida law, by contrast, permits executions even when only a bare majority of the jury recommends that sentence, and without any provision requiring more than a majority to endorse any single aggravator. Petitioner's jury voted seven to five for execution and, as shown in his brief, Pet. Br. at 2, 7-8, it is possible that as few as three or four jurors found the presented aggravators. This difference too is constitutionally significant. *See Johnson*, 406 U.S. at 366 (Blackmun, J, concurring) ("I do not hesitate to say, either, that a system employing a 7—5 standard, rather than a 9—3 or 75% minimum, would afford me great difficulty.").

Fourth, and most to the point of this history brief, the *Apodaca* plurality's conclusions about the history of the Sixth Amendment and the Framer's understanding of the jury right were simply incorrect. The plurality acknowledged but then rejected the possibility that Congress "eliminated

references to unanimity" not for substantive effect, but "because [it was] thought already to be implicit in the very concept of jury." *Apodaca*, 406 U.S. at 409-10 (emphasis added). As shown in the detailed history above, the plurality chose the wrong alternative. Framers, judges, and scholars writing before, during and after the Bill of Rights was written and ratified all agreed that the jury right our Founders fought for was the English common-law right. That right indisputably encompassed unanimity. *See, e.g.* 4 Blackstone Commentary 343.

Fifth, since *Apodaca*, the Court has repeatedly assumed the applicability of the unanimity rule to state criminal prosecutions. *See Apprendi*, 530 U.S. at 477 (noting requirement of facts "confirmed by the unanimous suffrage of twelve of [accused's] equals and neighbours" and quoting Blackstone); *Blakely v. Washington*, 542 U.S. 296, 303 (2004) (quoting *Apprendi* and Blackstone); *S. Union Co. v. United States*, __ U.S. __, 132 S. Ct. 2344, 2355 (2012) (same). *See also Ring*, 536 U.S. at 610 (Scalia, J., concurring).

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The historical record thus overwhelmingly supports the Court's assumption of unanimity as part of the jury right in the *Apprendi* line of cases. At a minimum, this record demonstrates that a jury vote of seven to five (or less) to determine facts predicate to a death sentence is insufficient under the Sixth Amendment, the Eighth Amendment, and *Ring*. Because Hurst was denied these protections, his death sentence should be reversed.

II. FLORIDA'S DISREGARD OF THE JURY'S HISTORIC ROLE IN CAPITAL SENTENCING ALSO VIOLATES THE EIGHTH AMENDMENT.

Amici agree with petitioner that the Florida capital sentencing scheme violates the Eighth Amendment because it: (1) deprives the jury of the ability to "'express the conscience of the community on the ultimate question of life or death.'" *Ring*, 536 U.S. at 615-16 (Breyer, J., concurring) (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968)); (2) fails to produce the reliable outcomes this Court's jurisprudence requires, *see, e.g.*, *Beck*, 447 U.S. at 638; and (3) falls far outside the consensus practice of death-penalty jurisdictions by not entrusting a jury with the authority to sentence, or even to find facts needed for a death sentence. *See, e.g.*, *Hall v. Florida*, __ U.S. __, 134 S. Ct. 1986, 1992 (2014). *See* Pet. Br. at 35, 47-49 (setting forth these various arguments, including asking this Court to overrule *Spaziano v. Florida*, 468 U.S. 447 (1984)).

Here, too, history supports petitioner's view of the jury's role in capital cases.

A. The Jurors Of Common-Law England Decided The Facts That Determined If A Case Was Capital.

English juries, always unanimous, 2 Blackstone Commentaries 343, played a pivotal role in deciding if the accused would live or die. Historian Thomas Green has proven, in his authoritative analysis of early English juries, that, as early as the thirteenth century, jurors refused to convict on capital charges when they believed the crimes were

unworthy of execution. Green, *supra*, at 28-64;[16] *see also* Abramson, *supra*, at 217 (citing Green). *Cf. Jones v. United States*, 526 U.S. 227, 246 (1999) (citing Green's work); *Walton v. Arizona*, 497 U.S. 639, 711 n.3 (1990) (Stevens, J., dissenting) (citing Green's work), *overruled by Ring*, 536 U.S. at 586.

Green's analysis begins with thirteenth century English juries. Their "power to determine the defendant's fate was virtually absolute." *Green, supra,* at 19. Those acquitted were released. *Id.* "The guilty were hanged almost immediately." *Id.* Indeed, the judgment of conviction was termed "'*suspendatus est*,' ('he is hanged.')." Green, *The Jury and the English Law of Homicide, 1200-1600*, 74 Mich. L. Rev. at 424. Juries in effect were deciding the "appropriate circumstances under which a person's life might be surrendered to the Crown." *Green, supra,* at 20. *See also Apprendi*, 530 U.S. at 579-80 (showing that laws "prescrib[ing] a particular sentence for each offense" limited authority of English judges).

One of the tools at the jury's disposal in the Middle Ages was to decide if a homicide was committed in self-defense, a powerful means of saving the accused given the lack of gradations of homicide in that era. Green, *The Jury and the English Law of Homicide*, 1200-1600, 74 Mich. L. Rev. at 415, 427-36. Examining the ancient verdicts, Green found that "the frequent recourse to such

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[16] *See also* Thomas Andrew Green, *The Jury and the English Law of Homicide, 1200-1600*, 74 Mich. L. Rev. 413 (1976). For clarification, cites to "Green," *supra*, continue to refer to Green's book, while subsequent cites to this article will employ its short form.

findings resulted mainly from the jury's desire to save the lives of defendants who had committed simple homicide." *Id.* at 431. The juries did so to limit homicide convictions to the "most culpable homicides." *Id.* at 432. *See also id.* at 416 (finding "the local community considered" execution "appropriate mainly for the real evildoer: the stealthy slayer who took his victim by surprise and without provocation"); *McGautha v. California*, 402 U.S. 183, 197-98 (1971) (recounting this history), *overruled on other grounds by Furman v. Georgia*, 408 U.S. 238 (1972).

The jury later found a tool in the "benefit of clergy," originally designed to try and punish ordained clergy in the Church rather than the courts, but eventually extended (in the courts) to anyone literate enough to recite a Bible verse. Green, *supra*, at 117. The jury's role was to decide if the crime committed qualified for the benefit, which would result in branding of the convicted and a year's imprisonment. *Id.* at 118. In the case of homicide, that meant deciding whether the crime was manslaughter or murder. *Id.* at 121-22. As jurors "recogniz[ed] that benefit of clergy provided an alternative sanction [to execution] for simple homicide," the conviction rate went up, and the previously high rate of self-defense verdicts went down. *Id.* at 122. The percentage of offenders condemned to death, over this period, "remained about the same," *id.* at 122, preserving over time the jury's unique role as arbiter of community sentiment. *See Ring*, 536 U.S. at 615 (Breyer, J., concurring). *See also McGautha*, 402 U.S. at 197-98 (recounting this same history).

In the sixteenth and seventeenth centuries, new legal distinctions between capital and non-capital alternatives allowed the jury to do the work of deciding whom was fit for execution:

> Many of those indicted for grand larceny were, by virtue of the jury's undervaluation of the goods stolen or their own plea of guilty to a lesser offense, convicted of petty larceny, which was not capital, just as some of those indicted for murder were mercifully convicted of manslaughter. Convictions were high in those capital felonies that had long been viewed as particularly heinous and in those non-capital offenses that had come to serve as catchalls much as self defense had in earlier times.

Green, supra, at 107. Thus, in common-law England, the jury played the role, still relevant today, of deciding whether the "culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed." *Kennedy v. Louisiana*, 554 U.S. 407, 442 (2008) (internal citation and quotation marks omitted).

During the founding era and before, English society generally saw the jury's exercise of merciful discretion as appropriate, rather than a nefarious species of nullification. *Id.* at 311-15. In fact, while the jury held the ultimate power, the bench itself frequently encouraged juries to "undervalue goods and convict the defendant of a clergyable offense. out of compassion, to do rough justice in cases where the punishment would have appeared

disproportionate to the culpability of the offender." *Id.* at 149. *See also id.* at 286 (recounting similar judicial encouragement).

As Green explains, "so long as the sanction for felony remained so severe, and so long as it applied at least in theory to so large a field of cases, the very nature of the trial was bound to be seen as related to the concept of merciful verdicts." *Id.* And of course the nature of an English criminal trial required unanimous verdicts; such consequential matters were never decided by a bare majority.

B. American Juries At The Time Of Our Founding Carried On With The Pivotal Role In The Execution Decision.

Unanimous juries played an exclusive role in capital decisions in our new Nation too. The Court has already reviewed the history in detail. *See Woodson*, 428 U.S. at 289-93; *McGautha*, 402 U.S. at 197-201. In *Woodson*, the Court observed that at "least since the Revolution, American jurors have, with some regularity, disregarded their oaths and refused to convict defendants where a death sentence was the automatic consequence of a guilty verdict." 428 U.S. at 293. Juries' refusals to return verdicts of guilty to avoid the consequence of execution drove the movement behind reducing "the number of capital offenses and to separate murder into degrees." *Id.*

The first reform was for the state to limit "classes of capital offenses." *Id.* at 290 (footnote omitted). Even then, juries would refuse to "convict murderers rather than subject them to automatic

death sentences." *Id.* The next step, led by Pennsylvania in 1794, was to separate murder into degrees and confine mandatory execution to deliberate and premeditated killings. *Id.* Other states followed until the practice became nearly universal. *Id.*

Juries however "continued to find the death penalty inappropriate in a significant number of first-degree murder cases and refused to return guilty verdicts for that crime." *Id.* at 291. The next set of reforms came in the antebellum era, and allowed juries deciding guilt also to recommend mercy. *Id.* By the turn of the century, 23 states plus the federal government had adopted the practice. *Id.*

This Court's interpretation of Congress's 1897 statute highlighted the singular role of juries in capital sentencing. *See Winston v. United States*, 172 U.S. 303 (1899). There, the Court reversed a murder conviction because the trial judge had instructed the jury that a mercy recommendation was warranted only if it found mitigating circumstances. *Id.* at 313. The Court found this charge thwarted Congress's design to commit the question of execution to the "judgment and the consciences of the jury." *Id.* at 312-13. The question of mercy was thus exclusively reserved for the jury. It was for the jury alone to weigh in its decision "age, sex, ignorance, illness or intoxication, of human passion or weakness, of sympathy or clemency, or the irrevocableness of an executed sentence of death. or any other consideration whatever[.]" *Id.* The Court relied in part on the consistent practices of the states interpreting similar schemes. *Id.* (collecting state cases from the era).

By the end of World War I, "all but eight States, Hawaii, and the District of Columbia either had adopted discretionary death penalty schemes or abolished the death penalty altogether." *Woodson*, 428 U.S. at 291. "By 1963, all of these remaining jurisdictions had replaced their automatic death penalty statutes with discretionary jury sentencing." *Id.* at 291-92. *See also generally McGautha*, 402 U.S. at 197-201 (recounting same history). And across these capital jurisdictions, neither the old mandatory procedures nor the new discretionary ones allowed death sentences upon the factual findings of a non-unanimous jury. *See* Abramson, *supra*, at 180-81 (noting only exception to requirement of unanimous, twelve-person juries has been non-capital cases in Louisiana and Oregon, and Florida's capital sentencing scheme).

Petitioner brings this history to the present with his showing that all capital jurisdictions, except for Florida, presently require a jury to unanimously find the aggravators required for a death sentence, and only four jurisdictions join Florida in leaving the final sentencing decision to the judge. Pet. Br. at 29, 42-43. Ironically, the Florida Legislature's move to eliminate the jury's role only in capital sentencing, while establishing aggravators that must be proven for a death sentence, came in response to *Furman v. Georgia*, 408 U.S. 238 (1972). *See* Charles W. Ehrhardt et al., *The Aftermath of Furman: The Florida Experience*, 64 J. Crim. L. & Criminology 2, 12, 15-17 (1973).

As in England, American juries' decisions have long been conclusive as to which people and which crimes are deserving of society's most severe

punishment. *See also* Wilson, *supra*, at 1008-09 (arguing that the power to decide if a "fellow citizen shall live or die" is a burden and responsibility too great for any one person). Juries speak for society and the local community in particular. They serve as a critical barometer. When a capital sentencing scheme relegates jurors to an advisory role, and a bare majority votes on facts necessary for a death sentence, the purpose of retribution cannot be properly served, *Kennedy*, 554 U.S. at 442, the requisite reliability cannot be achieved, *Beck*, 447 U.S. at 638, and the scheme falls outside of a consensus for determining a death sentence that is humane and just. *Hall*, 134 S. Ct. at 1007.

Because Hurst was sentenced to death under such a constitutionally faulty scheme, his death sentence must be reversed.

CONCLUSION

The judgment of the Florida Supreme Court should be reversed.

Respectfully submitted,

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